11-1800-10043-2

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Rate Appeal of Inisfail, Inc., Seventh Street Home, and 214 Park Avenue Home	ORDER REGARDING CROSS MOTIONS FOR SUMMARY DISPOSITION

The above-captioned matter is pending before Administrative Law Judge Barbara L. Neilson pursuant to a Notice of and Order for Hearing and Prehearing Conference issued by the Deputy Commissioner of the Minnesota Department of Human Services on September 20, 1995. Both parties have moved for summary disposition of the issues in this matter. Oral argument regarding the motions was heard on September 5 and 12, 1996, in the courtrooms of the Office of Administrative Hearings in Minneapolis, Minnesota. The record on the motions closed on September 19, 1996, upon the receipt of additional information from the Providers which was requested during oral argument.

Mary K. Martin, Attorney at Law, Gray, Plant, Mooty, Mooty & Bennett, P.A., 33 South Sixth Street, Suite 3400, Minneapolis, Minnesota 55402-3796, appeared on behalf of Inisfail, Inc., Seventh Street Home, and 214 Park Avenue Home (hereinafter referred to jointly as the "Providers").[1] Steven J. Lokensgard, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127, appeared on behalf of the Department of Human Services (hereinafter referred to as the "Department" or "DHS").

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the Memorandum attached hereto,

IT IS HEREBY ORDERED as follows:

(1) The Providers' Motion for Summary Disposition on the issue of the 1991 salary of Jacqueline Gretz is GRANTED. The salary shall be classified as originally reported on the cost report filed by Inisfail, Inc.

(2) The Department's Motion for Summary Disposition on the issue of the 1992 salary of Jacqueline Gretz is GRANTED and the reclassification of that salary shall remain unchanged.

(3) Both parties' Motions for Summary Disposition on the issue of the imposition of the 48-bed limitation for top management salary is DENIED since genuine issues of material fact remain for hearing. A hearing shall be held to consider that issue.

(4) The Providers' Motion for Summary Disposition is GRANTED with respect to the propriety of allowing an adjustment to be made to Russel Kennedy's 1989 Inisfail compensation and his 1992 Inisfail and Seventh Street compensation to correct the erroneous inclusion of fringe benefits and payroll taxes. However, genuine issues of material fact remain for hearing regarding the exact amount of such adjustments.

(5) The Providers' Motion for Summary Disposition with respect to the inclusion of accrued sick leave and vacation time in Mr. Kennedy's hours is GRANTED. The calculation of hours worked by Mr. Kennedy shall include the hours during which he took vacation and sick leave as originally reported on the Providers' cost reports.

(6) A telephone conference call will be held on December 13, 1996, at 2:30 p.m. to discuss the scheduling of the hearing regarding the application of the 48-bed limitation to the Providers and the amount of the adjustments to be made regarding the 1989 cost report of Inisfail and the 1992 cost report of Inisfail and Seventh Street. The Administrative Law Judge will initiate the call.

Dated this _____ day of November, 1996.

_____
BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

Inisfail, Inc., is a non-profit intermediate care facility for mentally retarded persons ("ICF/MR") located in Faribault, Minnesota. Seventh Street Home and 214 Park Avenue Home are proprietary ICFs/MR owned by Russel Kennedy which are also located in Faribault. These three ICFs/MR, along with several non-ICF/MR programs serving persons with development disabilities, receive management and central office services from Cenneidigh, Inc. (pronounced "Kennedy"), which is another company owned by Mr. Kennedy. In July, 1992, Mr. Kennedy took responsibility for establishing management procedures and hiring both staff and management of Glendalough, Inc., a not-for-profit 6-bed ICF/MR in Austin, Minnesota. Glendalough did not receive state reimbursement for its costs until October 22, 1992.

The Providers submitted cost reports to DHS for reimbursement of allowable costs incurred in providing care to residents of their ICFs/MR under the federal Medicaid Act, 42 U.S.C. § 1396a, and the state's Medical Assistance Program, Minn. Stat. Ch. 256B. The reimbursement rates at issue in this case were set under Minn. R. 9553.0010 through 9553.0080 ("Rule 53"). Rule 53 rates are set on an annual basis and are based upon costs incurred in the prior year. The Department conducts an annual "desk audit" review of a facility's cost report. Minn. R. 9553.0020, subp. 16. The Department is also authorized to conduct a more intense on-site "field audit" of a facility's books and records supporting its cost reports. Id., subp. 20. Field audits may encompass the four most recent annual cost reports for which desk audits have been completed and payment rates

have been established. Minn. R. 9553.0041, subp. 11(B). After the Department has conducted either a desk audit or a field audit, the facility may appeal the findings if a successful appeal would result in a change to the facility's total payment rate. Minn. Stat. § 256B.50, subd. 1; Minn. R. 9553.0080, subp. 1(A). Once an appeal is received, the Department must issue a written determination. Minn. Stat. § 256B.50, subd. 1h(b). If the facility disagrees with the Department's determination, it may request a contested case hearing to determine the proper resolution of specified appeal items. Id., subd. 1h(d).

DHS conducted Rule 53 field audits of the Providers' facilities that encompassed calendar years 1991 and 1992 and desk audits that encompassed calendar years 1989 and 1992. As a result of these desk audits and field audits, a variety of costs were reclassified and some were disallowed. A number of these adjustments were appealed by the Providers. The proper treatment of salaries and fringe benefits for two employees, Jacqueline Gretz and Russel Kennedy, is the subject of this contested case appeal.

Both parties contend that they are entitled to summary disposition in this matter on all issues. Summary disposition is the administrative equivalent to summary judgment. Minn. Rules pt. 1400.5500(K). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03. The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested cases. See Minn. Rules pt. 1400.6600.

It is well established that, in order to successfully resist a motion for summary judgment, the non-moving party must show that specific facts are in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the non-moving party by substantial evidence; general averments are not enough to meet the non-moving party's burden under Minn. R. Civ. P. 56.05. Id.; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W. 2d 507, 512 (1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988). Summary judgment may be entered against the party who has the burden of proof at the hearing if that party fails to make a sufficient showing of the existence of an essential element of its case after adequate time to complete discovery. Id. To meet this burden, the party must offer "significant probative evidence" tending to support its claims. A mere showing that there is some "metaphysical doubt" as to material facts does not meet this burden. Id.

I. Gretz Salary Issues

Jacqueline Gretz was employed by Inisfail in May of 1984. In 1987, she helped Cenneidigh, Inc., open a four-bed waivered service facility in Faribault and continued to work at that facility after that time, in addition to her work at Inisfail. Gretz Deposition at 4, 6. Prior to 1991, Ms. Gretz worked full-time as a program director for the Inisfail ICF/MR

facility and reported that she worked an average of 2,080 hours per year. During the 1991 calendar year, Ms. Gretz continued to serve as the full-time program director for Inisfail. She also performed "resource counselor" and training functions at a waivered service facility for Cenneidigh, Inc., and worked for 214 Park assisting the program director, supervising and training nursing staff, and helping the facility implement certain procedures to serve residents with special needs. Id. at 6-9, 30-32; Kennedy Deposition at 6; Ex. 220. In 1992, Ms. Gretz helped fill the program director and registered nurse position vacancies at Seventh Street Home in addition to working at Inisfail, 214 Park, and Cenneidigh, Inc. Id. 19. She also was involved in helping Glendalough become operational. Gretz Deposition at 27. The dispute in this case relates to the proper allocation of Ms. Gretz's salary to these entities in 1991 and 1992.

Ms. Gretz was paid a salary of $32,823 in 1991 for the position she held as program director of Inisfail. Exs. 221, 231. This salary was agreed upon at the beginning of the rate year. Gretz Deposition at 12. When Ms. Gretz started working for Cenneidigh, Inc., and 214 Park in 1991, she negotiated a specific lump sum amount of pay for performing specific tasks, based upon projections of what amount of time it would take to accomplish certain tasks. Id. at 13-15, 21-22. During 1991, Ms. Gretz received $2,450 from Cenneidigh and $1,442 from 214 Park. Her total compensation in 1991 thus was $36,715. Exs. 221, 231. Ms. Gretz kept track of her time on a daily basis and was able to show the hours she worked away from Inisfail. The auditors determined that Ms. Gretz had worked a total of 2,798.75 hours in 1991. Of that total, 524.5 hours, or 18.74% of her time, was spent working for Cenneidigh at the waivered services facility. Ex. 228. These figures translate into an average rate of pay of $15.07 per hour at the two ICFs/MR, and an average rate of pay of $4.67 per hour at the waivered service facility. During the field audit, the DHS auditors questioned the lower rate of pay Ms. Gretz received for her work at the waivered services facility. They requested documentation supporting the rate of pay paid to Ms. Gretz by the various entities, along with the consulting/management agreement or appropriate job descriptions. Ex. 203. Don Helmer, a CPA who works with the Providers, responded that Ms. Gretz was the full-time Program Director for Inisfail in 1991 and also performed services for Park Home and Cenneidigh on a part-time basis for compensation that was the subject of employee-employer negotiations. Ex. 204. A position description for the program director position dated January 4, 1993, was provided. Ex. 205.

Because the field auditors determined that written documentation or a compensation plan explaining the basis for the differing rates of pay was lacking, they allocated Ms. Gretz's total salary for 1991 based on the ratio of actual time she spent performing services for each organization. To do so, they multiplied the percent of time Ms. Gretz worked for Cenneidigh (18.74%) by the total salary she had received in 1991 ($36,715), to arrive at $6,880. Ex. 221. As explained by the Department in its Memorandum in Support of its Motion for Summary Disposition, "[t]his amount represents the amount [Ms. Gretz] should have received from Cenneidigh, Inc., [for her work on non-ICF/MR activities] assuming an equal rate of pay for each facility." Memorandum at 6. From that amount, the auditors subtracted the amount actually paid to Ms. Gretz by Cenneidigh ($2,450) to arrive at $4,430, which was disallowed on the Inisfail cost report for

the reporting year ending December 31, 1991. Ex. 221. All of the disallowance was applied to Inisfail, most likely because the auditors determined that the amount of time Ms. Gretz worked at 214 Park was immaterial. Fischer Deposition at 41.

Ms. Gretz continued to work as a salaried employee at Inisfail, Cenneidigh, and 214 Park during 1992. She was not employed at Inisfail full-time during 1992, as she had been in 1991. Ms. Gretz also began working at Seventh Street Home and Glendalough during 1992. Although there were discussions regarding how she would be compensated for the additional hours worked, no written agreement was ever reached. Gretz Dep. at 23. Ms. Gretz continued to be paid primarily through the Inisfail corporation during 1992 because only full-time employees were eligible for health insurance. Gretz Deposition at 12; Helmer Deposition at 19. At the end of 1992, Mr. Helmer and Mr. Kennedy allocated Ms. Gretz's 1992 salary to the various facilities by taking into consideration the number of hours she worked at each facility and the value of the different services she performed at each facility. Helmer Deposition at 14-16. The allocation made by Mssrs. Helmer and Kennedy at the end of 1992 was not based on any specific hourly wage for the various positions held by Ms. Gretz. Id. As in 1991, Ms. Gretz kept a daily log during 1992 showing the number of hours spent at each facility. Gretz Deposition at 26. She worked a total of 2,834.25 hours during 1992 at the following facilities: 1,520.75 hours at Inisfail, for which she was allocated compensation of $18,658 (effective rate of pay of $12.27 per hour); 523.25 hours at Cenneidigh for which she was allocated compensation of $3,596 (effective rate of pay of $6.87 per hour); 413.5 hours at Glendalough for which she was allocated compensation of $4,000 (effective rate of pay of $9.67 per hour); 278.75 hours at Seventh Street for which she was allocated compensation of $12,000 (effective rate of pay of $43.05 per hour); 98.0 hours at 214 Park for which she was allocated compensation of $2,404 (effective rate of pay of $24.53 per hour);[2] and an additional 8.75 hours at a facility identified in the audit workpapers as "KCG," which apparently is a rehabilitation corporation. Exs. 218, 222; Gretz Deposition at 26. Her total compensation during 1992 from all facilities except KCG was $40,658. Ex. 219.

The DHS field auditors requested documentation explaining the various rates of pay which resulted from the allocation of Ms. Gretz's pay to the various entities. DHS determined that there were no written documents or compensation plan explaining the basis for the differing rates of pay and again allocated her total salary based on the ratio of actual time spent performing services for each organization. They allocated Ms. Gretz's salary to the various entities based on an average rate of pay $14.30 and the number of hours worked at each facility. Ex. 219. As a result of this allocation, the amount reported on the Inisfail cost report was adjusted upward in the amount of $3,089; the amount reported on the Seventh Street cost report was adjusted downward in the amount of $8,014; and the amount reported on the 214 Park cost report was adjusted downward in the amount of $1,099. Id. Other adjustments were made to allocate fringe benefits and payroll tax among the facilities for which Ms. Gretz worked in 1991 based upon the same ratios as the salary. Ex. 241.

The Department argues that Rule 53 requires that facilities must allocate costs to various related or nonrelated organizations based on a ratio of the actual time spent

performing the services for each related or nonrelated organization. The Department relies on Minn. R. 9553.0030, subp. 5(A), which provides as follows:

> Costs of services must be allocated based on the documentation of time spent performing the service by each individual providing services to the related organization or nonrelated organization. All identifiable expenses including salary, fringe benefits, and payroll taxes, travel, and supplies of an individual providing services for related organizations or nonrelated organizations must be allocated based on the ratio of actual time spent performing the services for each related or nonrelated organization.

The Department asserts that it is important to the integrity of the MA reimbursement system that amounts paid by related organizations for services performed are accurately allocated and warns that any other approach could permit facilities to report the majority of the cost of an individual's salary as an ICF/MR cost and thereby inflate the MA facility's future rate. The Department contends that the only allocation which is proper under the Rule 53 is one that looks only at the actual hours worked at each facility.

The Providers argue in response that the proper treatment of Ms. Gretz's salary is governed by Minn. R. 9553.0030, subp. 1(C). That rule provides in pertinent part that, "[e]xcept for persons in top management, the compensation of any person having multiple duties . . . must be directly identified and classified to the appropriate cost categories on the basis of time distribution records that show actual time spent, or an accurate estimate of time spent on various activities." The Providers contend that, in accordance with this rule and the overall approach taken under Rule 53, costs are to be directly identified if possible and allocation is to be the method of last resort. They emphasize that Ms. Gretz maintained time distribution records showing the actual time she spent working in each of the facilities and that her compensation accordingly may be directly identified to the appropriate facility. They argue that the Department's application of Minn. R. 9553.0030, subp. 5(A), in this situation leads to an absurd result under which 13.5% of an otherwise allowable full-time salary is disallowed. The Providers assert that the effect of the disallowance is to penalize a facility for being cost-efficient in asking an existing employee to work extra hours in addition to full-time work rather than hiring additional personnel to perform the extra work.

In the reporting and audit process, salary costs that can be directly identified are assigned to the cost categories from which they arose. Direct identification and allocated costs between cost centers are the methods used to properly report salary costs. See Minn. R. 9553.0030, subp. 1(A) and (C). There is no question that the different portions of Ms. Gretz's salary can be directly identified to the facilities that benefited from her services. The issue is whether direct identification is appropriate, or whether her compensation must be allocated by hours worked under Minn. Rule 9553.0030, subp. 1(C).

Ms. Gretz was offered a salary rate at the beginning of 1991 for full-time work at Inisfail. The salary costs attributable to Ms. Gretz's work as a program director at Inisfail were directly identified by the Providers. There is no evidence that receipt of the salary from Inisfail was dependent upon Ms. Gretz agreeing to work the additional hours for Cenneidigh or 214 Park, nor are there any facts suggesting that the Providers were attempting to allocate non-ICF/MR salary costs to Inisfail. There also is no evidence that the ICFs/MR did not receive appropriate services for the compensation provided to Ms. Gretz, or that the salary Ms. Gretz received from Inisfail was somehow excessive for a program director.[3] Moreover, it is undisputed that Ms. Gretz worked 2,274.25 hours for Inisfail during 1991, nearly 200 hours more than the standard full-time expectation of 2,080 hours.[4] Under these circumstances, there is no legitimate basis for the disallowance. Once a provider has supported a direct identification of the compensation expense for a full-time employee as required by Minn. Rule 9553.0030, subp. 1(A) and (C), and there is no other basis to question the legitimacy of the cost, there is no proper basis for further inquiry and no reason to disallow a portion of the cost. It is not appropriate here for the Department to complain about the benefit of the bargain received by the other facilities or to determine "appropriate" compensation and adjust the cost.

The Department has also argued that its disallowance of Ms. Gretz's 1991 compensation is appropriate because Rule 53 requires that salaries be supported by a written compensation policy. The Providers assert that they have met the written policy requirement and contend that it is evident in the workpapers of the DHS auditors that they in fact determined that the facilities had an adequate written compensation plan. See, e.g., Ex. 233 (at Audit Step J-11 for Cenneidigh, the auditors concluded that "[t]here is a written policy for payment for services performed at the facility by facility personnel"). In discovery conducted in conjunction with another recent contested case proceeding, a DHS field auditor acknowledged that a written position description and time and attendance records were sufficient to constitute a written compensation policy supporting the base salary given to a nursing home administrator. See In the Matter of the Rate Appeal of E.W.L. Enterprises, Inc., d/b/a Golden Oaks Nursing Home, OAH Docket No. 11-1800-9690-2 (Recommended Order issued June 10, 1996), at 8. There is no question that the salaries in this matter were documented for time and attendance and that a position description exists and was provided to the Department auditors for the program director position held by Ms. Gretz at Inisfail. Thus, there is no issue in this matter concerning the documentation of Ms. Gretz's Inisfail salary. The Administrative Law Judge thus recommends that the Department's $4,430 disallowance for the program director salary at Inisfail be reversed.

In contrast, Ms. Gretz worked only 1,520.75 hours at Inisfail during 1992, and thus was not a full-time program director at Inisfail during that year. The Providers were aware that Ms. Gretz would not be working full-time for Inisfail in 1992. Unlike the situation in 1991, there was no direct identification in 1992 of salary costs to the various facilities and no full-time position establishing a salary standard for Ms. Gretz in that year. The Providers contend that they attempted to allocate Ms. Gretz's salary between the ICFs/MR and non-ICF/MR facilities at the end of the year in a way that was "fair and reasonable." Kennedy Deposition at 8-9. In preparing the cost report for each facility at the end of

1992, Mssrs. Kennedy and Helmer allocated Ms. Gretz's salary to the various facilities based upon the total hours she worked at each facility and their assessment of the relative value of that work to each facility. Helmer Deposition at 14-16. Although the record in this case does not contain any detailed information concerning the nature of the analysis the Providers conducted in determining the value of Ms. Gretz's work, it is evident that they did not use a particular hourly rate when deciding upon the allocation and it appears that the determination was based at least in part upon consideration of the cost of hiring outside personnel to do the evening and weekend work performed by Ms. Gretz. Helmer Deposition at 21.

Minn. R. 9553.0030, subp. 5(A), requires that allocations be made on the basis of actual hours worked at each facility. Although the rule may implicitly permit the application of an hourly rate where an employee is performing different services at different facilities, the rule does not appear to allow the application of the vague and subjective "value of work performed" assessment that was used by the Providers in 1992. There is an appreciable risk of cost-shifting using the Providers' method which the rule is designed to prevent. The Providers have not provided any persuasive argument for applying any standard other than that set forth in Minn. R. 9553.0030, subp. 5(A), which requires such allocations to be done by hours worked. Because the Providers used an allocation method other than the method required by Rule 53 and have not demonstrated that the use of their allocation method is permissible, the Administrative Law Judge has recommended that the Department's reclassification and disallowance of Ms. Gretz's salary in 1992 be affirmed.[5]

II. Kennedy Salary Issues

Russel Kennedy is the Executive Program Director for Inisfail, 214 Park, Seventh Avenue Home, and Glendalough. Kennedy Deposition at 4. The issues relating to Mr. Kennedy in this matter involve the allowability of compensation he received from these facilities during the reporting years ending December 31, 1989, and December 31, 1992.

1989 Compensation

For the rate year 1989, the Providers claimed compensation for Mr. Kennedy's work at Inisfail on four separate lines. Ex. 300. The total amount of compensation claimed was $24,554. During a desk audit performed by the Department of Inisfail's cost report for the year ending December 31, 1989, the DHS auditor compared the number of hours Mr. Kennedy actually worked at Inisfail (643) to a standard employee's full time hours (2080) and concluded that 30.9% of his time was spent working for that facility. The Department multiplied the $61,431 top management salary limit for that year by 30.9% and concluded that the maximum allowable compensation for Mr. Kennedy for his work at Inisfail was $18,900.[6] Subtracting the allowable amount from the amount claimed resulted in a disallowance of $5,564. The amount of the disallowance was allocated proportionately to each line of the cost report on which Mr. Kennedy's compensation was reported. Id. In making this adjustment, the Department relied on Minn. R. 9553.0035, subp. 14(A)

(1995). Under that rule, "[a] person who is included in top management personnel who performs necessary services for the facility or provider group on less than a full-time basis, may receive as allowable compensation no more than a prorated portion of [$61,431 for the reporting year ending December 31, 1989] based on time worked."

Inisfail apparently does not object to the salary reclassification, but contends that the reclassification is incomplete because only the salary portion, and not the fringe benefit portion, has been reclassified. Inisfail contends that the portion of Mr. Kennedy's salary originally reported on line 6171 of the cost report (management consulting fees) included payroll taxes and fringe benefits as well as salary. Payroll taxes are not included in the definition of "compensation" set forth in Minn. R. 9553.0035, subp. 6(A) (1995), and fringe benefits are specifically excluded from the definition of "top management compensation" subject to a maximum dollar amount under Minn. R. 9553.0035, subp. 14(C) (1995). While the Department agrees that payroll taxes and fringe benefits are not to be included in the amount of total compensation paid for the purpose of calculating the top management compensation limit, it argues that Inisfail never submitted an amended cost report for the year ending December 31, 1989. The Department points out that Minn. R. 9554.0041, subp. 14 (B) and (D) (1995), requires providers to submit any amendment to the cost report with supporting documentation within fourteen months of the date on which the original cost report was filed. The Department asserts that the Providers have not offered documentation supporting the percentage of fringe benefits that they claim was erroneously included in Mr. Kennedy's compensation. The Department also argues that it would be inappropriate for the Administrative Law Judge to act as a first-tier decisionmaker concerning the Providers' claim rather than reviewing a specific action by the Department. The Department thus contends that it would be improper to allow an "amendment" to Inisfail's cost report to correct the asserted error.

It is undisputed that the Providers never filed an amended cost report with respect to Mr. Kennedy's 1989 compensation. While Rule 53 only requires the Commissioner to make retroactive adjustments to the total payment rate of a facility if the amendment to a cost report is filed within 14 months of the original cost report, the Rule does not prohibit the Commissioner from making retroactive adjustments where circumstances otherwise warrant such an adjustment. See Minn. R. 9553.0041, subp. 14 (1995). In the present case, the Department does not dispute that fringe benefits and payroll taxes are appropriately reported on separate lines of the cost report. The adjustments made by the Department during its desk audit of the Providers' 1989 and 1992 cost reports apparently triggered the Providers' discovery of their error in reporting. Mr. Helmer explained during his deposition the manner in which the error was made. Helmer Deposition at 22-29. He testified that he had been "attempting to resolve for years this conflict with regard to Russ Kennedy's compensation, the method of billing through job service type costs," that he "had discussions with people over the years as to how to report that," and that he "kept having discussions with people at DHS" about this issue. Id. at 23-24. The issue was raised during the Providers' interchanges with the Department concerning the desk audit and the appeal of the Department's adjustments to Mr. Kennedy's compensation. The issue was the subject of a timely amendment to the 1992 cost reports of Inisfail and

Seventh Street and the Department accepted the adjustments and made the changes for all employees except Mr. Kennedy.

Under these circumstances, an adjustment to correct the Providers' error is warranted.[7] The Providers have not established as a matter of law, however, the exact amount of that adjustment. In their brief, they assert that fringe benefits and payroll taxes in 1989 were "at least" 15% of total compensation, without further supporting testimony or documentation. The Administrative Law Judge has concluded that this question must be addressed at a hearing. Accordingly, Inisfail will be allowed to correct its error and correctly classify payroll taxes and fringe benefit costs allowed under Rule 53. The proper amount of fringe benefit costs and payroll taxes associated with Mr. Kennedy's salary must be established by the Providers at the hearing and, if established, shall be added back in as an allowable cost on the appropriate lines of the cost report.

1992 Compensation

A Department auditor also made disallowances and adjustments to Mr. Kennedy's claimed compensation during a desk audit of the cost reports submitted for Inisfail, 214 Park, and Seventh Street for the reporting year ending December 31, 1992. In 1992, Mr. Kennedy's compensation was reported on two different lines of the cost reports submitted for 214 Park and Seventh Street, and on three different lines of the cost report submitted for Inisfail. Exs. 401-02, 501-02, and 601-02. The auditor determined that the provider group increased from 45 beds to 51 beds when Glendalough began operating as a six-bed ICF/MR on October 22, 1992, and reclassified any portion of Mr. Kennedy's compensation that had not been previously reported in the administrative cost category to that line on the cost report. As a result, the auditor adjusted the cost reports to report the following amounts of compensation: Inisfail, $16,892 on line 6811; Seventh Street, $21,967 on line 6813; and 214 Park, $13,013 on line 6813. Id.

The desk auditor also determined that (1) the 449 hours reported for Inisfail included 31 vacation and sick hours not taken or paid and 23 hours worked for and paid by Cenneidigh, Inc.; (2) the 598 hours reported for Seventh Street included 41 vacation and sick hours not taken or paid and 31 hours worked for and paid by Cenneidigh, Inc.; and (3) the 347 hours reported for Inisfail included 24 vacation and sick hours not taken or paid and 18 hours worked for and paid by Cenneidigh, Inc. The auditor concluded that it was inappropriate for the Providers to include vacation and sick hours not taken and hours worked for and paid by Cenneidigh, Inc., among the number of hours worked by Mr. Kennedy at each facility, and subtracted these hours to reflect the fact that Mr. Kennedy actually worked 395 hours at Inisfail, 526 hours at Seventh Street, and 305 hours at 214 Park. Exs. 401, 501, and 601.

After reclassifying Mr. Kennedy's compensation to the administrative cost category on each cost report and adjusting the number of hours worked at each facility, the desk auditor calculated each facility's compliance with the top management compensation limit, using the same procedure as discussed above with respect to the 1989 desk audit. Thus,

the auditor divided the number of hours actually worked at each facility by 2080 to arrive at a percentage of full-time work performed by Mr. Kennedy at each facility, then multiplied those percentages by the top management compensation limit for the 1992 reporting year to arrive at a maximum allowable compensation for Mr. Kennedy at each facility. The amount of the difference between the amount reported and the maximum allowable compensation was disallowed on each facility's cost report. Exs. 400, 500, and 600. For Inisfail, $3,959 was disallowed on line 6811; for Seventh Street, $4,744 was disallowed on line 6813; and for 214 Park, $3,029 was disallowed on line 6813.

The Providers contend that the Department's adjustments were inappropriate because Glendalough was not part of the Cenneidigh provider group and, in any case, some apportionment is appropriate where there were fewer than 48 beds prior to October 22, 1992. They also assert that fringe benefits and payroll taxes should be added back in on the appropriate lines of the cost reports and that Mr. Kennedy's vacation and sick hours should have been counted in determining the total time he spent working for the various facilities. Each of these issues will be discussed below.

Application of 48-Bed Limitation

An individual who is compensated for top management services may allocate his or her pay in various cost categories reflecting the number of hours spent on each activity. Minn. R. 9553.0035, subp. 14(A) (1995). However, Rule 53 makes it clear that "[t]he compensation of a person who is classified as top management personnel and who performs any service for the central, affiliated, or corporate office must be allocated to the facility's administrative cost category . . . if the facility or provider group served by the central, affiliated, or corporate office has more than 48 licensed beds." Minn. R. 9553.0030, subp. 1(D) (1995) (hereinafter referred to as "the 48-bed limitation"). Inisfail, 214 Park, and Seventh Street each have 15 licensed beds. Glendalough has six licensed beds and began receiving reimbursement under Rule 53 on October 22, 1992. If Glendalough is appropriately included in the Cenneidigh provider group during 1992, the provider group had 51 licensed beds for the reporting year ending December 31, 1992, and each facility would be required to report all of Mr. Kennedy's compensation in the administrative cost category.

The Department argues that the inclusion of Glendalough in the Cenneidigh provider group is appropriate based upon its contention that Cenneidigh, Inc., and its employees exercised control over the management, operations, and policies of Glendalough in 1992. The Department emphasizes that Glendalough was developed by Mr. Kennedy at the request of Mower County and DHS and that Mr. Kennedy hired the program director and most of the staff. Helmer Deposition at 29-31. From July to October, 1992, Ms. Gretz was Chairman of the Board of Directors for Glendalough. Gretz Deposition at 28; Ex. 702. In October, 1992, after an executive director was hired for Glendalough, Cenneidigh continued to ensure that operations ran smoothly. Helmer Deposition at 32. Based upon these facts, the Department argues that Cenneidigh and its employees exercised control over the operations of Glendalough in 1992. The Providers

respond that Glendalough did not have the same directors as Cenneidigh. They argue that, although Ms. Gretz may have been the nominal director of Glendalough prior to October 22, 1992, she apparently had no knowledge of this position and could not be said to have exercised "control." Gretz Deposition at 27. The Providers thus assert that Glendalough should not be considered part of the Cenneidigh control group. They also argue that, even if it is determined that Glendalough was part of the Cenneidigh provider group, the rule should not be applied to Glendalough until the first day of the next reporting period in order to permit the limitations imposed to be managed and planned.

Rule 53 defines a "provider group" as "a parent corporation, any subsidiary corporations, partnerships, management organizations, and groups of facilities operated under common ownership or control that incurred the costs shown on the cost report which are claimed for reimbursement under [Rule 53]." Minn. R. 9553.0020, subp. 37 (1995). The Department acknowledges that Glendalough is not operated under common ownership with the other facilities, but contends that it is under common control. "Control" is defined in the Rule to mean "the possession, direct or indirect, of the power to direct or cause the direction of the management, operations, or policies of a person, whether through the ownership of voting securities, by contract or otherwise." Minn. R. 9553.0020, subp. 39(D) (1995). In advancing its argument, the Department cited the circumstances of Mr. Kennedy taking over Glendalough as follows:

> Glendalough was developed at the request of Mower County and DHS [the Department]. Helmer Depo. 29. According to Mr. Helmer, "Mr. Kennedy put his good name behind it. Because everybody wanted it, he said, if you want it, I will do it." Id. 30. Mr. Kennedy was the developer, hired the program director and hired most of the staff. Id. 31. From July to October, 1992, Jacqueline Gretz was the Chairman of the Board of Directors for Glendalough. Gretz Depo. 28; Ex. 702. In October, 1992, after an executive director was hired by Glendalough, Cenneidigh continued to ensure that operations ran smoothly. Helmer Depo. 32. Ms. Gretz assisted Glendalough "in setting up our systems at that particular facility." Gretz Depo. 27 (emphasis added). Clearly Cenneidigh, Inc. and its employees exercised control over the operations of Glendalough in 1992, and should be included in the Cenneidigh provider group. As such, DHS correctly reclassified all of Mr. Kennedy's compensation to the administrative cost category.

Department Memorandum at 20. Additional background on the arrangement was provided by Donald Helmer, CPA for the Providers. He stated:

> I think I made a contribution to it [Glendalough]. The people who sold us the land made a contribution. Basically that's where the funds came from to start, along with Mower County. Mr. Kennedy put his good name behind it. Not happily. So, it got developed, but part of the problem with the whole thing is it turned out to be not to our benefit because, again, the intent was

> that it not be detrimental to Mr. Kennedy's operation. That's not the way it turned out. For some reason, they decided that Margaret Booe was nothing, didn't count as being the chairman and director. In truth, she is not related to anybody I am aware of in this room or in the Cenneidigh organization. It didn't seem to matter to DHS. When they do -- whatever they want to do, they do it.

Helmer Deposition at 30.

Based upon all of the evidence provided by the parties, there is a genuine issue of material fact regarding the extent to which the Cenneidigh provider group could be said to "control" Glendalough. It appears that Mr. Kennedy's primary involvement ended after Glendalough began to receive MA reimbursement on October 22, 1992. Although Ms. Gretz apparently was the nominal chairman of the board of directors of Glendalough prior to October 22, 1992, she was unaware of her position. Gretz Deposition at 28. Moreover, there is no evidence that Ms. Gretz is a part of top management in the Cenneidigh organization or is related in any way to Mr. Kennedy. Another individual, Margaret Booe, who was completely unrelated to the Cenneidigh group, became the director after Glendalough began to receive reimbursement from the state in October of 1992 and apparently served in that capacity until she died early in 1993. Helmer Deposition at 31-32. Moreover, the history provided by the Department and Mr. Helmer suggest that Cenneidigh became involved in the operation of the Glendalough ICF/MR at the suggestion of the Department, but with an intent that there be no adverse consequences to the Cenneidigh group. In Department of Human Services v. Muriel Humphrey Residences, 436 N.W.2d 110 (Minn. App. 1989), rev. denied, April 26, 1989, the Department was equitably estopped from enforcing the 24-bed or less rule against a provider where the provider reasonably relief upon a DHS representation that changing its licensing would not affect its funding. There are insufficient facts developed in the record of these summary disposition motions for the Administrative Law Judge to assess whether the Department should be estopped from applying the 48-bed limit to the Providers. A hearing is necessary to resolve this issue. Accordingly, the parties' Motions for Summary Disposition have been denied with respect to the application of the 48-bed limitation.

Erroneous Inclusion of Fringe Benefits and Payroll Taxes

On May 24, 1994, the Providers submitted amended cost reports for Inisfail and Seventh Street Home for the reporting year ending December 31, 1992. Exs. 505, 605. No amended cost report was filed on behalf of 214 Park. In letters accompanying the amended cost reports of Inisfail and Seventh Street Home, Mr. Helmer, the Providers' CPA, asserted that a mistake had been made in preparing these cost reports since the original amounts reported as Mr. Kennedy's compensation had erroneously included the payroll taxes and fringe benefits associated with the compensation. Exs. 519, 625. Mr. Helmer requested that the payroll taxes and fringe benefits be factored out of those lines of the cost report and instead be reported on line 6929 of each facility's cost report. Mr. Helmer urged that 17.74% of the amount reported as Mr. Kennedy's salary should be

reclassified to line 6929 of the Inisfail cost report and that 16.45% of the amount reported as Mr. Kennedy's salary should be reclassified to line 6929 of the Seventh Street cost report. Exs. 505, 519, 605, and 625. The Department did not accept these amendments to the cost reports.

The Department admits that Inisfail and Seventh Street filed timely amended cost reports with respect to the 1992 reporting year,[8] but asserts that the Providers have not supplied adequate documentation to support the amount of any adjustment that should be made. Once again, the Department does not dispute the fact that fringe benefits and payroll taxes are properly reported on other lines of the cost report. The amended cost reports submitted by Inisfail and Seventh Street included both Mr. Kennedy and other employees. The Department allowed the adjustments with respect to all employees other than Mr. Kennedy. See Letter from Mr. Helmer to Ms. Martin dated Sept. 5, 1996 (supplied by the Providers at the Sept. 12, 1996, oral argument). As discussed above, the proper method of reporting Mr. Kennedy's compensation had long been a topic of discussion between Mr. Helmer and the Department. The Administrative Law Judge concludes that it is appropriate to permit an adjustment to be made to correct the Providers' error. Although the Providers have offered testimony and documentation from Mr. Helmer to support their arguments that adjustments of 17.74% and 16.45% are appropriate, the Department has presented facts suggesting that the requested adjustments are not appropriate. Therefore, there are genuine issues of fact regarding the amount of the adjustment that is proper which must be addressed at a hearing. Accordingly, Inisfail and Seventh Street will be allowed to correct their errors and correctly classify payroll taxes and fringe benefit costs allowed under Rule 53. The proper amount of fringe benefit costs and payroll taxes associated with Mr. Kennedy's salary must be established by the Inisfail and Seventh Street at the hearing and, if established, shall be added back in as an allowable cost on the appropriate lines of the cost report.

Deletion of Vacation and Sick Hours

An additional issue raised by the parties is whether the DHS adjustment reducing the claimed number of hours worked by Mr. Kennedy in 1992 is appropriate. The Department deducted from Mr. Kennedy's hours the amount of vacation and sick time paid but not taken by Mr. Kennedy.[9] The issue raised in this case is whether the Providers may properly include vacation and sick hours paid but not actually taken as hours actually worked at the various facilities.[10] Rule 53 requires that Mr. Kennedy allocate the costs of his services in accordance with the "actual time spent performing services for each related or nonrelated organization." Minn. R. 9553.0030, subp. 5(A) (1995). In the Department's view, the facility cannot properly claim vacation and sick time compensation for reimbursement under Rule 53 unless that time is "vested." Minn. Rule 9553.0035, subp. 6(A)(1) (1995). Rule 53 defines "vested" to mean "the existence of a legally fixed unconditional right to a present or future benefit." Minn. R. 9553.0020, subp. 48 (1995). The Department argues that Mr. Kennedy's vacation and sick leave benefits did not become vested in any facility during 1992 because Mr. Kennedy testified during his deposition that unused vacation or sick benefits are not paid to himself or other salaried employees each year. Kennedy Deposition at 11. The Department also contends that

vacation leave that was not actually taken cannot be considered "actual time spent" at a particular facility. Therefore, the Department asserts, the Providers cannot include vacation or sick time in the cost claimed for Mr. Kennedy's salary. The Providers argue in response that Rule 53 contains no provision supporting the adjustment made by the Department. They point out that Rule 53 does not restrict employers or employees from working at one job while taking paid vacation from another job and argue that no business standard exists to prohibit this practice. They further assert that Mr. Helmer testified that hourly employees (such as Mr. Kennedy) were in fact paid for unused vacation and sick time during the audit period and allege that Mr. Kennedy was merely testifying during his deposition about the current system which was adopted in 1993, after the time frame relevant to the audit. The Department has not offered any evidence to refute the testimony provided by Mr. Helmer about the Providers' policies during the time period relevant to the audit.

The "vesting" of a right merely means that one has an "immediate or fixed right to present or future enjoyment [which] does not depend on an event that is uncertain." Black's Law Dictionary at 1735 (Rev. 4th ed. 1968). When an employee is paid for accrued sick leave and vacation time, the right to payment for such accrued time becomes fixed and absolute. In this instance, the unused vacation and sick time was actually paid to Mr. Kennedy when he received his salary. Absent some rule or other authority to disallow the payment of accrued vacation and sick time or the taking of vacation or sick time while working at a related facility, the Department lacks authority to ignore Mr. Kennedy's right to accrued vacation and sick time in calculating allowable compensation. There is no basis in the rule to deny the Providers the use of those hours in calculating the appropriate allocation for Mr. Kennedy between facilities simply because Mr. Kennedy's work schedule did not permit him to discontinue working altogether during those periods. No genuine issue of fact has been raised by the Department and the Providers are entitled to disposition in their favor on this issue as a matter of law.

III. Conclusion

The Providers' Motion for Summary Disposition is granted with respect to the issue of the 1991 salary of Jacqueline Gretz. The Department's Motion for Summary Disposition is granted with respect to the issue of the 1992 salary of Jacqueline Gretz. Both parties' Motions for Summary Disposition are denied with respect to the issue of the imposition of the 48-bed limitation for top management salary since genuine issues of material fact remain for hearing. The Providers' Motion for Summary Disposition is granted with respect to the propriety of allowing an adjustment to be made to Russel Kennedy's 1989 Inisfail compensation and his 1992 Inisfail and Seventh Street compensation to correct the erroneous inclusion of fringe benefits and payroll taxes. However, genuine issues of material fact remain for hearing regarding the exact amount of such adjustments. Finally, the Providers' Motion for Summary Disposition with respect to the inclusion of accrued sick leave and vacation time in Mr. Kennedy's hours is granted. The calculation of hours worked by Mr. Kennedy shall include the hours during which he took vacation and sick leave as originally reported on the Providers' cost reports.

A conference call will be held on December 13, 1996, at 2:30 p.m. to discuss the scheduling of the hearing regarding the application of the 48-bed limitation to the Providers and the amount of the adjustments to be made regarding the 1989 cost report of Inisfail and the 1992 cost report of Inisfail and Seventh Street.

B.L.N.

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[1] The Notice of and Order for Hearing filed in this matter stated that the appeals of all three of these facilities had been consolidated for hearing, but named only Inisfail, Inc., in the caption. During oral argument on the motions for summary disposition, the Administrative Law Judge raised the question of whether all three facilities should be named in the caption. Both parties believed it would be appropriate to do so. Accordingly, the caption of this case has been amended to include the names of Seventh Street Home and 214 Park Avenue Home, in addition to Inisfail, Inc.

[2] Exhibit 218 indicates that the amount reported as allocated to 214 Park is $2,500. After taking into account the salary accruals, the amount which should have been reported is $2,404.

[3] In 1990, Inisfail paid Ms. Gretz a salary of $30,278. See Don Helmer's Letter of Jan. 5, 1995, to Commissioner Gomez. This is very similar to the salary of almost $33,000 paid by Inisfail to Ms. Gretz in 1991.

[4] The Department indicated in its Statement of Need and Reasonableness at the time that Rule 53 was proposed that its definition of full time was "40 hours." See Statement of Need and Reasonableness at 28 (July 2, 1985). In addition, Judge Lunde recommended changes in the language of the rule recognizing that full time employees work "an average of 40 hours each week." Report on Proposed Rule 53 at 27. It is evident in the Department's discussion of Mr. Kennedy's top management compensation that it considers 2080 hours per year to be full time employment.

[5] Contrary to the Providers' argument, it does not appear that the report issued by Judge Lunde at the time that Rule 53 was proposed for adoption suggests that it would be inappropriate for the Department's auditors to apply the method of allocation employed here.

[6] It appears that the correct amount should actually be $18,982.

[7] This determination is further supported by the fact that, under Minn. R. 9553.0041, subps. 11 and 13, the Department may make retroactive adjustments to cost reports and payment rates as a result of desk and field audits if errors are discovered that must be corrected, regardless of whether that correction requires an increase or decrease in the rate paid. Thus, if the Department had found the Providers' error during a desk or field audit, it would have allowed the correction to be made. There is no significant distinction between correcting an error discovered by virtue of an amendment to the cost report or a field audit and correcting that same error during a contested case proceeding by deciding that it is appropriate to allow the cost on different lines. To hold otherwise would elevate form over substance. It also would be an inefficient use of resources to require providers who discover errors after 14 months have elapsed to request a field audit as their only hope of obtaining an adjustment.

[8] It is undisputed that the 214 Park Street Home never filed an amended cost report. No information has been provided in the record of this proceeding regarding whether the Providers contend that a similar error was made in the 1992 cost report of 214 Park.

[9] The Department also deleted time Mr. Kennedy spent working for Cenneidigh, Inc. It is clear that the hours Mr. Kennedy spent working for Cenneidigh, Inc., may not properly be reported as hours worked for a

particular ICF/MR. The Providers have not made any argument to the contrary. This portion of the Department's adjustment obviously is appropriate.

[10] The Providers apparently contend that, when vacation and/or sick time was paid to Mr. Kennedy by one facility, Mr. Kennedy was actually working at a related facility. See Provider's Brief in Support of Motion at 34. For purposes of this motion, however, the Administrative Law Judge will look at the facts in the light more favorable to the Department and will assume that Mr. Kennedy was simply paid at the end of the year for accrued vacation and sick leave that he had not taken during the year.